MTD Prime Sdn Bhd v See Hwee Keong & Ors and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS C-04(NCVC)(W)-372–11 OF 2014 AND C-04-(NCVC)(W)-365–11 OF 2014

IDRUS HARUN, BADARIAH SAHAMID AND HARMINDAR SINGH JJCA

12 JULY 2016

Civil Procedure — Parties — Capacity — Mental disability of party — Whether plaintiff person under disability — Whether lacking capacity to bring proceedings — Impairment of ability to recall events due to injuries suffered in accident — Meaning of mentally disordered person — Rules of Court 2012 O 76 r 2(1) — Mental Health Act 2001 s 52

Tort — Negligence — Contributory negligence — Approach to be taken by trial judge — Whether negligence of defendant to be established first before establishing contributory negligence — Whether finding of contributory negligence justified on evidence

Tort — Trespasser — User of road under construction and yet to be gazetted as a highway — User involved in construction works — Whether user trespasser — Whether user in frolic of his own

Tort — Vicarious liability — Agent — Accident causing personal injuries — Whether driver in employment is agent — Whether employer vicariously liable for negligence of driver

Tort — Vicarious liability — Independent contractor — Accident causing personal injuries — Whether subcontractor an independent contractor — Whether main contractor vicariously liable for negligence of independent subcontractor — Test to determine whether independent contractor

The plaintiff commenced a claim pursuant to a motor vehicle accident. The third defendant ('MTD Prime') was the main contractor in charge of the construction of the Pantai Timur Highway ('LPT'). The plaintiff was the employee of a company, Q-Free Sdn Bhd ('Q-Free'), which was in charge of installing the toll system at LPT. The first defendant was the employee of Ireka Engineering & Construction Sdn Bhd ('Ireka Engineering'), a subsidiary

company of the second defendant ('Ireka Construction'). The first defendant was also the driver of the bull dozer bearing registration No BCT 7086 ('the bulldozer') which was owned by Ireka Construction. Ireka Construction was the subcontractor hired by MTD Prime to perform works in the construction of the LPT. The plaintiff was driving along the LPT when the bulldozer driven by the first defendant at the other side of the road suddenly made a U-turn into the plaintiff's right of way. The plaintiff's car collided with the bulldozer, and the plaintiff suffered serious injuries. At the time of the accident, the LPT was not opened to the public. The sessions court judge ('the SCJ') found the plaintiff 90%liable and the first defendant 10% liable for the accident. The second and third defendants were held not liable. The High Court judge ('the HCJ') allowed the plaintiff's appeal and held that the plaintiff was 30% liable and the first, second and third defendants were 70% liable. The third defendant ('MTD Prime') and the first and second defendants lodged separate appeals, namely, Appeal 372 and Appeal 365 respectively. It was contended on behalf of the defendants that the plaintiff had no locus standi to bring this action as he lacked the mental capacity to do so. The first and second defendants also sought to evade liability on the ground that since the LPT was under construction and not gazetted as a highway, it could not come within the statutory definition of 'road' under s 2 of the Road Transport Act 1987 ('the Act').

Held, dismissing Appeal 365 and allowing Appeal 372 with costs:

(1) As a matter of law, the main contractor cannot be held vicariously liable for the negligence of the subcontractor who is in effect an independent contractor (see para 12).

(2) Ireka Construction was an independent contractor. No evidence was led to show that MTD Prime was in control of the actual performance of the works by Ireka Construction. It appeared that the manner in which the works were to be done was left to Ireka Construction. There may be instances where the law may impose a direct duty on the employer which cannot be delegated to an independent contractor. However this was not the pleaded case and was never raised as an issue. Even on the claim under occupier's liability, the same principle applies. Hence, there could be no liability against MTD Prime (see para 13).

(3) The SCJ was in serious error when she embarked right away in determining the negligence of the plaintiff. This was clearly the wrong approach. The duty of the trial judge in such cases is to first determine negligence of the defendants by considering the particulars of negligence provided in the pleadings and the evidence adduced at the trial. It is only after this determination that a consideration of contributory negligence would follow again based on the pleadings and the evidence (see para 16).

(4) By no measure could the finding of 90% negligence on the part of the plaintiff be supported by the evidence. However, there was more than sufficient evidence that the plaintiff's car was being driven at an unsafe speed and this would certainly have contributed to the accident. In the circumstances, contributory negligence on the part of the plaintiff to the tune of 30% was not an unreasonable assessment (see paras 19 & 23).

(5) The vicarious liability of the second defendant could not be doubted. The second defendant had admitted ownership of the bulldozer BCT 7086. It was further admitted that the first defendant was operating the bulldozer with the second defendant's consent. So although the first defendant was an employee of Ireka Engineering, he was most certainly an agent of the second defendant when operating the bulldozer at the time of the accident (see para 23).

(6) There was also no question that the plaintiff was not a trespasser on the LPT. The plaintiff was a senior manager of Q-Free Sdn Bhd, which was involved in setting up and testing the toll system. The plaintiff and his passengers in the car were therefore not on a frolic of their own but were present on the LPT on legitimate business and for this purpose it could hardly be denied that they had permission to use the LPT (see para 24).

(7) As a general rule under O 76 r 2(1) of the Rules of Court 2012 ('the ROC'), a person under disability does not have the capacity to bring proceedings in court. However, s 52 of the Mental Health Act 2001 requires that an inquiry be held before any person is declared to be a mentally disordered person (see para 26).

(8) The plaintiff could not be said to be a mentally disordered person as he had not been so found by due course of law to be mentally disordered and incapable of managing himself and his affairs. The evidence adduced at the trial did not even remotely suggest that the plaintiff was mentally disordered although he had suffered serious injuries causing his ability to recall events to be impaired. This did not necessarily equate to him being mentally disordered. He was able to give evidence in court although he had little recollection of the accident (see para 28).

(9) The issue regarding mental capacity was not raised at the trial and was only raised during the appeal before the High Court. The High Court was right to reject this issue (see para 29).

(10) The definition of 'road' under s 2 of the Act also includes a road under construction (see para 30).

[Bahasa Malaysia summary

Plaintif telah memulakan satu tuntutan menurut satu kemalangan kenderaan bermotor. Defendan ketiga ('MTD Prime') adalah kontraktor utama yang bertanggungjawab untuk pembinaan Lebuh Raya Pantai Timur ('LPT').

Plaintif adalah pekerja syarikat, Q-Free Sdn Bhd ('Q-Free'), yang bertanggungjawab memasang sistem tol di LPT. Defendan pertama adalah pekerja Ireka Engineering & Pembinaan Sdn Bhd ('Ireka Engineering') anak syarikat defendan kedua ('Ireka Construction'). Defendan pertama juga adalah pemandu jentolak dengan pendaftaran No BCT 7086 ('jentolak') yang dimiliki oleh Ireka Construction. Ireka Construction adalah subkontraktor yang diupah oleh MTD Prime untuk melaksanakan kerja-kerja pembinaan di LPT. Plaintif sedang memandu di sepanjang LPT apabila jentolak yang dipandu oleh defendan pertama di seberang jalan tiba-tiba membuat pusingan U-turn ke dalam laluan plaintif. Kereta plaintif bertembung dengan jentolak, dan plaintif mengalami kecederaan yang serius. Pada masa kemalangan tersebut, LPT tidak dibuka kepada orang ramai. Hakim mahkamah sesyen ('HMS') mendapati plaintif 90% bertanggungjawab dan defendan pertama 10% bertanggungjawab untuk kemalangan tersebut. Defendan kedua dan ketiga diputuskan tidak bertanggungjawab. Hakim Mahkamah Tinggi ('HMT') membenarkan rayuan plaintif dan memutuskan bahawa plaintif adalah 30% bertanggungjawab dan defendan pertama, kedua dan ketiga adalah 70% bertanggungjawab. Defendan ketiga ('MTD Prime') dan defendan pertama dan kedua mengemukakan rayuan berasingan, iaitu, Rayuan 372 dan Rayuan 365. Dihujahkan bagi pihak defendan-defendan bahawa plaintif tidak mempunyai locus standi untuk membawa tindakan ini kerana dia tidak mempunyai keupayaan mental untuk berbuat demikian. Defendan pertama dan kedua juga menuntut untuk mengelakkan liabiliti atas alasan bahawa memandangkan LPT adalah di bawah pembinaan dan tidak diwartakan sebagai lebuh raya, LPT tidak terangkum dalam definisi statutori 'jalan' di bawah s 2 Akta Pengangkutan Jalan 1987 ('Akta').

Diputuskan, menolak Rayuan 365 dan membenarkan Rayuan 372 dengan kos:

(1) Undang-undang terpakai ialah kontraktor utama tidak boleh diputuskan bertanggungjawab secara vikarius untuk kecuaian subkontraktor yang sebenarnya merupakan seorang kontraktor bebas (lihat perenggan 12).

(2) Ireka Construction adalah kontraktor bebas. Tiada bukti yang menunjukkan bahawa MTD Prime yang mengawal perlaksanaan sebenar kerja-kerja oleh Ireka Construction. Kelihatan bahawa cara di mana kerja-kerja dilakukan adalah tertakluk kepada Ireka Construction. Terdapat kemungkinan di mana undang-undang boleh mengenakan duti secara langsung ke atas majikan yang tidak boleh diwakilkan kepada kontraktor bebas. Walau bagaimanapun ini bukan kes yang diplidkan dan tidak pernah dibangkitkan sebagai isu. Walaupun atas tuntutan di bawah liabiliti penghuni, prinsip yang sama terpakai. Oleh itu, tiada liabiliti terhadap MTD Prime (lihat perenggan 13).

(3) HMS melakukan kekhilafan yang serius apabila beliau dengan segera

menentukan kecuaian plaintif. Ini jelas pendekatan yang salah. Kewajipan hakim perbicaraan dalam kes-kes sebegitu ialah pertamanya, menentukan kecuaian defendan-defendan dengan mempertimbangkan butir-butir kecuaian yang diperuntukkan dalam pliding dan keterangan yang dikemukakan pada perbicaraan. Hanya selepas penentuan ini, pertimbangan kecuaian penyumbang akan dituruti berdasarkan pliding dan keterangan (lihat perenggan 16).

(4) Tiada ukuran dapatan 90% kecuaian di pihak plaintif boleh disokong oleh bukti. Walau bagaimanapun, terdapat bukti yang lebih daripada mencukupi bahawa kereta plaintif dipandu pada kelajuan yang tidak selamat dan ini sudah tentu menyumbang kepada kemalangan. Dalam keadaan ini, kecuaian penyumbang di pihak plaintif sebanyak 30% bukannya satu penilaian yang tidak munasabah (lihat perenggan 19 & 23).

(5) Liabiliti vikarius defendan kedua tidak dapat diragukan. Defendan kedua telah mengakui milikan BCT jentolak 7086. Selanjutnya, diakui bahawa defendan pertama telah mengendalikan jentolak dengan persetujuan defendan kedua. Oleh itu, walaupun defendan pertama adalah seorang pekerja Ireka Engineering, dia sememangnya adalah ejen defendan kedua semasa mengendalikan jentolak pada masa kemalangan (lihat perenggan 23).

(6) Tiada persoalan bahawa plaintif bukannya penceroboh di LPT. Plaintif adalah seorang pengurus kanan Q-Free Sdn Bhd, yang terlibat dalam menubuhkan dan menguji sistem tol. Plaintif dan penumpang di dalam kereta tersebut dengan itu tidak bermain-main tetapi hadir di LPT atas perniagaan yang sah dan untuk tujuan ini adalah sukar untuk menafikan bahawa mereka telah mendapat kebenaran untuk menggunakan LPT (lihat perenggan 24).

(7) Sebagai peraturan am di bawah A 76 k 2 (1) Kaedah-kaedah Mahkamah 2012 ('KKM'), orang tak berkeupayaan tidak mempunyai kapasiti untuk membawa prosiding di mahkamah. Walau bagaimanapun, s 52 Akta Kesihatan Mental 2001 memerlukan satu siasatan dijalankan sebelum mana-mana orang diisytiharkan sebagai seorang yang bercelaru mental (lihat perenggan 26).

(8) Plaintif tidak boleh dikatakan sebagai seorang yang bercelaru mental kerana dia tidak disahkan mengikut undang-undang sebagai bercelaru mental dan tidak berupaya menguruskan dirinya dan hal ehwalnya. Keterangan yang dikemukakan di perbicaraan langsung tidak menunjukkan bahawa plaintif bercelaru mental walaupun dia mengalami kecederaan serius yang menyebabkan keupayaannya untuk mengingati peristiwa-peristiwa akan terjejas. Ini tidak semestinya menyamakannya sebagai seorang yang bercelaru mental. Dia mampu

untuk memberi keterangan di mahkamah walaupun dia mempunyai sedikit ingatan berhubung kemalangan tersebut (lihat perenggan 28).

(9) Isu berhubung kapasiti mental tidak ditimbulkan di perbicaraan dan hanya ditimbulkan semasa rayuan di hadapan Mahkamah Tinggi. Mahkamah Tinggi bertindak tepat menolak isu ini (lihat perenggan 29).

(10) Definisi 'jalan' di bawah s 2 Akta juga termasuk jalan yang masih dalam pembinaan (lihat perenggan 30).]

Notes

For cases on contributory negligence, see 12(1) *Mallal's Digest* (5th Ed, 2015) paras 1263–1333.

For cases on parties in general, see 2(4) *Mallal's Digest* (5th Ed, 2015) paras 6456–6747.

For cases on vicarious liability in general, see 12(2) *Mallal's Digest* (5th Ed, 2015) paras 2370–2424.

Cases referred to

Divian Micheal a/l Augustin Paes v Mohd Falil bin Md Amin [2013] 7 MLJ 313, HC (refd)

Honeywill and Stein Ltd v Larkin Brothers Ltd [1934] 1 KB 191, CA (refd)

Lim Gim Seah v Lokman bin Talib & Ors [2012] 4 MLJ 308, CA (refd)

Salsbury v Woodland and others [1970] 1 QB 324, CA (refd)

See Wan Chon v Chua Ka Bu [1990] 2 MLJ 460, HC (refd)

Wu Siew Ying t/a Fuh Lin Bud-Grafting Centre v Gunung Tunggal Quarry & Construction Sdn Bhd & Anor [2011] 2 MLJ 1; [2011] 1 CLJ 409, FC (refd)

Legislation referred to

Mental Health Act 2001 ss 2, 51, 52

Road Transport Act 1987 s 2

Rules of Court 2012 O 76 rr 1, 2, 2(1)

Subordinate Courts Act 1948 s 65

Appeal from: Civil Appeal No 12BNCVC-120–12 of 2013 (High Court, Kuantan)

Bastian Vendargon (Anne Vendargon with him) (Omar & Joseph Au) for the plaintiff.

R Vinayaga (Diba Natalia Ishak with him) (Skrine) for the first and second defendants.

CB Loh (Ronald Lee with him) (Lee Hishammuddin Allen & Gledhill) for the third defendant.

Harmindar Singh JCA:

[1] There are two appeals before us ('Appeal 372 and Appeal 365'). The appeals are against the decision of the High Court at Kuantan dated 20 October 2014. They concern a claim originating in the Sessions Court Kuantan involving a motor vehicle accident that occurred on the 26 July 2004. These appeals were ordered to be heard together. For convenience, the parties will be referred to as they were in the sessions court or by their abbreviated names.

[2] The third defendant ('MTD Prime') was the main contractor in charge of the construction of the Pantai Timur Highway ('LPT'). The plaintiff was the employee of a company, Q-Free Sdn Bhd ('Q-Free'), which was in charge of supplying, installing and testing the toll system at LPT. At the material time the plaintiff was the driver of the car bearing registration No WLK 4500 ('the said car').

[3] The first defendant was the employee of Ireka Engineering & Construction Sdn Bhd ('Ireka Engineering'), a subsidiary company of the second defendant ('Ireka Construction'). The first defendant was also the driver of the bulldozer bearing registration No BCT 7086 ('the bulldozer') which was owned by Ireka Construction. Ireka Construction was the subcontractor hired by MTD Prime to perform works in the construction of the LPT.

[4] On 26 July 2004, at about 1.30pm, the plaintiff was driving along the road at KM 200 LPT from Maran heading towards Gambang. At that time, the first defendant was driving the bulldozer at the other side of the road from the direction of Gambang to Maran. The first defendant suddenly made a U-turn into the plaintiff's right of way. As a consequence, the plaintiff's car collided with the bulldozer, and the plaintiff suffered serious injuries. It was not disputed that at the time of the accident, the LPT was not opened to the public.

[5] On 19 July 2010, the plaintiff commenced an action at the Kuantan Sessions Court against the first, second and third defendants claiming damages for injuries suffered. On 17 December 2013, the sessions court after a full trial held that the plaintiff was 90% liable for the accident. The first defendant was held 10% liable in negligence. The second and third defendants were held not liable and the claim against them was dismissed.

[6] On 19 December 2013, the plaintiff appealed against the sessions court's decision to the Kuantan High Court. On 20 October 2014, the Kuantan High Court allowed the appeal and varied the sessions court's decision in that the plaintiff was held 30% liable for the accident and the first, second and third

defendants were found to be 70% liable. The third defendant ('MTD Prime') and the first and second defendants lodged separate appeals, namely, Appeal 372 of 2014 and Appeal 365 of 2014 respectively.

AT THE SESSIONS COURT

[7] The salient grounds of decision by the sessions court can be stated as follows:

(a) the plaintiff was driving fast when he collided with the bulldozer. The impact of the collision was overwhelming until it had caused 'total loss' to the car driven by him. On balance of probability, the court found that the long braking mark was the result of fast driving by the plaintiff; and

(b) the lack of safety or warning signboards was not an issue as the road was not opened to the public. The court was satisfied that safety briefings were sufficiently given before the workers were allowed to enter the construction area. The safety and warning signboards were only required if the road had been opened to the public use and did not tantamount to be the main cause of the accident.

AT THE HIGH COURT

[8] The salient grounds of judgment by the High Court were as follows:

(a) if the first defendant did not make the U-turn, the accident would not have happened;

(b) it cannot be ascertained with certainty from any evidence available that the plaintiff was speeding;

(c) the second defendant's subsidiary company, Ireka Engineering, allowed the first defendant to drive the bulldozer during the accident when he had no licence;

(d) the bulldozer belonged to the second defendant. As such, the second defendant is vicariously liable; and

(e) the third defendant as the main contractor which appointed the second defendant had failed to ensure the safety of the passage at LPT. In particular, it had failed to ensure that the LPT was safe for the plaintiff and is therefore also vicariously liable in negligence.

APPEAL 372 BY MTD PRIME

[9] Based on the plaintiff's pleaded case, the plaintiff's cause of action against MTD Prime is premised on occupier's liability. This was conceded by learned counsel for the plaintiff. The issue of vicarious liability was never part

of the plaintiff's pleaded case against MTD Prime. The sessions court, in holding that MTD Prime was not responsible for the accident, held that MTD Prime did not breach its occupier's duty.

[10] On appeal, the High Court however found liability against both the second and third defendants on the basis of vicarious liability. In particular, the High Court found MTD Prime vicariously liable for the conduct of Ireka Construction in allowing it to use its bulldozer which caused the accident. It appeared that vicarious liability was attributed on account of MTD Prime being the main contractor of the LPT and having appointed Ireka Construction as its sub-contractor.

[11] In view of the foregoing, we are therefore in agreement with learned counsel for MTD Prime that the learned High Court judge had misapprehended the claim of the plaintiff. The High Court in essence had failed to decide the appeal based on the plaintiff's pleaded case. On this score alone, any liability held against MTD Prime should be set aside. In any event, no cross appeal was filed by the plaintiff on this finding of the High Court.

[12] Be that as it may, and as a matter of law, the main contractor cannot be held vicariously liable for the negligence of the subcontractor who is in effect an independent contractor (*Wu Siew Ying t/a Fuh Lin Bud-Grafting Centre v Gunung Tunggal Quarry & Construction Sdn Bhd & Anor* [2011] 2 MLJ 1; [2011] 1 CLJ 409). This court in *Lim Gim Seah v Lokman bin Talib & Ors* [2012] 4 MLJ 308 had cited with approval a passage from the judgment of Lord Justice Widgery in the case of *Salsbury v Woodland and others* [1970] 1 QB 324 at pp 336–337:

> It is trite law that an employer who employs an independent contractor is not vicariously responsible for the negligence of that contractor. He is not able to control the way in which the independent contractor does the work, and the vicarious obligation of a master for the negligence of his servant does not arise under the relationship of employer and independent contractor. I think that it is entirely accepted that those cases — and there are some — in which an employer has been held liable for injury done by the negligence of an independent contractor are in truth cases where the employer owes a direct duty to the person injured, a duty which he cannot delegate to the contractor on his behalf. The whole question here is whether the occupier is to be judged by the general rule, which would result in no liability or whether he comes within one of the somewhat special exceptions — cases in which a direct duty to see that care is taken rests upon the employer throughout the operation. This is clear from authority; and for convenience I take from *Salmond on Torts*, (14th Ed, 1965), p 687, this statement of principle:
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> > One thing can, however, be said with confidence: the mere fact that the work entrusted to the contractor is of a character which may cause damage to others unless precautions are taken is not sufficient to impose liability on the employer. There are few operations entrusted to an agent which are not capable, if due

precautions are not observed, of being sources of danger and mischief to others; and if the principal was responsible for this reason alone, the distinction between servants and independent contractors would be practically eliminated from the law.

[13] In the instant action, there appeared to be no dispute that Ireka Construction was an independent contractor. In any case, no evidence was led to show that MTD Prime was in control of the actual performance of the works by Ireka Construction (see *Honeywill and Stein Ltd v Larkin Brothers Ltd* [1934] 1 KB 191). It appeared that the manner in which the works were to be done was left to Ireka Construction. Now there may be instances where the law may impose a direct duty on the employer which cannot be delegated to an independent contractor. However this was also not the pleaded case and was never raised as an issue.

[14] Even on the claim under occupier's liability, the same principle applies. It was plain that MTD Prime had entrusted the works to Ireka Construction and was not directly involved with the works which resulted in the accident. There was no issue of whether MTD Prime owed a direct duty to the plaintiff in the sense that it was a non-delegable duty to ensure the highway under construction was safe. For these reasons, there can be no liability against MTD Prime. As such, the interference by the High Court in this regard was unwarranted. For these reasons, the appeal by MTD Prime must succeed.

APPEAL 365 BY THE FIRST AND SECOND DEFENDANTS

[15] To recap, the learned sessions court judge took the view at the end of the trial that the plaintiff was driving too fast and held him to be 90% negligent. The High Court on the other hand found insufficient evidence to show that the plaintiff was speeding and instead opined that it was mainly the fault of the first defendant in making the U-turn that caused this accident.

[16] In this connection, we are compelled to observe at the outset that the learned sessions judge was in serious error when she embarked right away in determining the negligence of the plaintiff. This was clearly the wrong approach. The duty of the trial judge in such cases is to first determine negligence of the defendants by considering the particulars of negligence provided in the pleadings and the evidence adduced at the trial. It is only after this determination that a consideration of contributory negligence would follow again based on the pleadings and the evidence (*Divian Micheal a/l Augustin Paes v Mohd Falil bin Md Amin* [2013] 7 MLJ 313).

[17] It may well be the case in the end that no negligence is proved against the defendants and hence the question of contributory negligence may not

arise. It may also transpire that the contributory negligence is higher in the event that negligence is proved. Whatever may be the case, it would be helpful if the trial court follows this approach and provide reasons for its finding on both negligence and contributory negligence.

[18] In the instant case, if the learned judge had followed this approach, she would have determined, as the learned High Court judge found, that negligence was proved against the first defendant. The material allegations of negligence of the defendants were proved by the evidence of SP4, a passenger in the said car driven by the plaintiff and the neutral evidence of the sketch plan, the photographs of the scene of the accident and the damage to the vehicles involved.

[19] The evidence of negligence against the first defendant was then fortified when he admitted to making a U-turn on the highway with his bulldozer into the rightful path of the plaintiff's motorcar. Significantly he admitted during cross-examination that he was not aware of the plaintiff's motorcar until he heard the brakes of the car followed by the sound caused by the collision. In the circumstances, appellate intervention by the High Court was clearly warranted as by no measure can the finding of 90% negligence on the part of the plaintiff be supported by the evidence.

[20] Now the High Court in reversing the finding of liability determined that the defendants' liability was at 70% and the plaintiff's contribution at 30%. However what is curious is that although the learned judge found no evidence of speeding on the part of the plaintiff, the plaintiff was nevertheless found 30% liable for the accident. No reasons appear to be provided as to how the plaintiff contributed to the accident. As we had alluded to earlier, reasons must always be provided for any determination of liability whether primary or contributory.

[21] Notwithstanding the paucity of reasons, it does appear to us from the evidence that the plaintiff at the relevant time was driving his car at an unsafe speed when all the circumstances are taken into account. In particular, the sketch plan showed a braking mark of 56.6 metres (or 185.696 feet) which does suggest that the car was travelling at some speed. There was reliance by both parties on the *Bingham*'s table for braking distances but it should be noted that technology in the braking system of motorcars advances so quickly that common sense will inform us that braking distances will now be much shorter than before.

[22] What is also significant is that the plaintiff's car did not come to a complete stop after the impact but skidded some 14.2 metres. The severe damage to the car into the almost stationary bulldozer also suggests a

momentum of not insignificant speed. The highway was still being completed and due care and caution was warranted. In our considered view, there is more than sufficient evidence that the plaintiff's car was being driven at an unsafe speed and this would certainly have contributed to the accident.

[23] In the circumstances, contributory negligence on the part of the plaintiff to the tune of 30% would not be an unreasonable assessment. We would accordingly affirm the finding of the learned High Court judge on liability although on somewhat different grounds. Additionally, the vicarious liability of the second defendant cannot be doubted. The second defendant had admitted ownership of the bulldozer BCT 7086 in its pleaded defence. It was further admitted that the first defendant was operating the bulldozer with the second defendant's consent. So although the first defendant was an employee of Ireka Engineering, he was most certainly an agent of the second defendant when operating the bulldozer at the time of the accident.

[24] There was also no question that the plaintiff was not a trespasser on the LPT. There was evidence that the plaintiff was a senior manager of Q-Free Sdn Bhd. The company was involved in setting up and testing the toll system. The plaintiff and his passengers in the car were therefore not on a frolic of their own but were present on the LPT on legitimate business and for this purpose it can hardly be denied that they had permission to use the LPT. That was the only way in which they could carry out their functions. The trial court came to this very conclusion which was affirmed on appeal. We find no reason to interfere with this finding. In the premises, the argument that the plaintiff was a trespasser and had no right to be on the LPT is without merit.

[25] Now there were also other issues raised by the first and second defendants in their appeal against the decision of the High Court. It was contended on behalf of the defendants that the plaintiff had no locus standi to bring this action as he lacked the mental capacity to do so. As a general rule under O 76 r 2(1) of the Rules of Court 2012 ('the ROC 2012'), a person under disability does not have the capacity to bring proceedings in court. Order 76 r 2(1) of the ROC 2012 provides:

> A person under disability may not bring, make a claim in, defend, make a counterclaim in, or intervene in any proceedings, or appear in any proceedings under a judgment or order notice of which has been served on him, except by his litigation representative.

[26] Order 76 r 1 of the ROC 2012 in essence provides that a person under disability is a person who is a minor or a patient. A 'patient' means a 'mentally disturbed person' within the meaning of the Mental Health Act 2001. Section 2 of the Mental Health Act 2001 defines the meaning of 'mental disorder' as follows:

A 'Mental disorder' means any mental illness, arrested or incomplete development of the mind, psychiatric disorder or any other disorder or disability of the mind however acquired; and 'mentally disordered' shall be construed accordingly.

B **[27]** However, what is of greater significance for the purpose of this appeal is the definition of a 'mentally disordered person' as set out in s 51 of the Mental Health Act 2001. The said s 51 provides that a 'mentally disordered person' means any person found by due course of law to be mentally disordered and incapable of managing himself and his affairs. The law in the form of s 52 of the Mental Health Act 2001 requires that an inquiry be held before any person is C declared to be a mentally disordered person.

[28] In the instant case, the plaintiff cannot be said to be a mentally disordered person as he has not been so found by due course of law to be D mentally disordered and incapable of managing himself and his affairs. This by itself is sufficient to defeat the argument raised by the defendants (*See Wan Chon v Chua Ka Bu* [1990] 2 MLJ 460). In any event, the evidence adduced at the trial did not even remotely suggest that the plaintiff was mentally disordered. No doubt he had suffered serious injuries and this has, amongst E others, impaired his ability to recall events. This does not necessarily equate to him being mentally disordered. He was after all able to give evidence in court although he had little recollection of the accident.

[29] We also note that this issue was not raised at the trial. It was only raised F during the appeal before the High Court. The parties at the trial court had possession of all the medical records concerning the disabilities of the plaintiff. No issue was raised as to the mental capacity of the plaintiff. The High Court was right to reject this issue of locus standi. For the reasons that we have provided, we see no reason to interfere with the decision of the High Court in G this regard. As we had alluded to earlier, this issue of lack of mental capacity is a non-starter on both legal and factual grounds.

[30] The first and second defendants also sought to evade liability on the ground that since the LPT was under construction and not gazetted as a H highway, it could not come within the statutory definition of 'road' under s 2 of the Road Transport Act 1987. It was accordingly asserted that this was not a road accident but a construction site accident. With respect, this argument overlooks the full definition of 'road' under the said s 2 as 'road' means any public road and any other road to which the public has access. For good I measure, the definition also includes a road under construction. This contention is therefore without merit.

[31] For completeness, we would also add that the arguments raised with respect to the jurisdiction of the sessions court to award damages and the

application of the Employees' Social Security Act 1969 are non-starters. As this was a claim in respect of a motor vehicle accident, the sessions court had unlimited jurisdiction to try such an action by virtue of s 65 of the Subordinate Courts Act 1948. The Employees' Social Security Act 1969 could not apply to the plaintiff as he was not an employee of the defendants and they were not his employers.

CONCLUSION

[32] In the circumstances, and for the reasons stated, we find no appealable error to warrant interference with the decision of the High Court in respect of Appeal 365 of 2014. Accordingly we dismiss the appeal with costs. As for Appeal 372 of 2014, we agree that the decision of the High Court was plainly wrong. We allow the appeal and set aside the order of the High Court and restore the order of the sessions court. The net effect is that the third defendant incurs no liability in this accident. As for costs, in respect of Appeal 365 of 2014, we order the first and second defendants to pay a sum of RM10,000 to the plaintiff as costs here and below. In respect of Appeal 372 of 2014, we order the plaintiff to pay a sum of RM10,000 to the third defendant as costs here and below. Order accordingly.

Appeal 365 dismissed and Appeal 372 allowed with costs.

Reported by Kanesh Sundrum